STATE OF MICHIGAN.
IN THE SUPREME COURT.

ON APPEAL FROM THE COURT OF APPEALS.
Borello PJ, White and Smolenski JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant.

-vs-

Supreme Court #. 126067
C.O.A. # 245175.
Lower Court # 02-004291.

DAVID WILLIAM SCHAEFFER,
Defendant-Appellee.

Wayne County Prosecutor's Office.
Attorney for Plaintiff.

Richard Glanda. (P32990).
Attorney for Defendant.

DEFENDANT-APPELLEE'S BRIEF ON APPEAL.

ORAL ARGUMENT REQUESTED.

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Defendant-appellee answers: Yes.

Plaintiff-appellant answers: No.

A. IS THE "SUBSTANTIAL" CAUSE LANGUAGE IN PEOPLE V. LARDIE, CONSISTENT WITH THE STATUTE MCL 257.625(4)?

Defendant-appellee answers: Yes.

Plaintiff-appellant answers: No.

B. DOES MCL 257.625(4) REQUIRE THE PROSECUTOR TO ESTABLISH THAT THE DEFENDANT'S OPERATION OF THE MOTOR VEHICLE WAS AFFECTED BY HIS INTOXICATED STATE?

Defendant-appellee answers: Yes.

Plaintiff-appellant answers: No.

C. DOES THE STATUTE OBLIGATE THE PROSECUTOR TO SHOW THAT THE DEFENDANT'S DRIVING AT THE TIME OF THE ACCIDENT WAS A PROXIMATE CAUSE OF ANOTHER PERSON'S DEATH?

Defendant-appellee answers: Yes.

Plaintiff-appellant answers: Yes.

D. IS IT SUFFICIENT THAT THE PROSECUTOR BE REQUIRED TO ONLY ESTABLISH THAT:

i. DEFENDANT DECIDED TO DRIVE WHILE INTOXICATED, AND

ii. THAT A DEATH RESULTED?

Defendant-appellee answers: No.

Plaintiff-appellant answers: Yes.

E. DOES THE STATUTE MCL 257.625(4) VIOLATE THE EQUAL PROTECTION CLAUSE OF THE MICHIGAN CONSTITUTION, [CONST 1963, ART 1 SEC 2], AND THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION [AM. XIV]?

Defendant-appellee answers: Yes.

Plaintiff-appellant answers: No.

II. WAS DEFENDANT DENIED A FAIR TRIAL WHEN THE COURT INDICATED TO THE JURY, WHILE DEFINING THE ELEMENTS OF THE OFFENSE, THAT THE PARTIES STIPULATED TO THE DEFENDANT'S

BLOOD ALCOHOL LEVEL AS BEING 0.16; AS THIS INSTRUCTION ESSENTIALLY DIRECTED A VERDICT ON AN ELEMENT OF THE CHARGED OFFENSE?

Defendant-appellee answers: Yes.

Plaintiff-appellant answers: No.

COUNTER-STATEMENT OF FACTS.

Defendant-appellee David William Schaeffer accepts the Plaintiff's Statement of Facts.

Additional facts are stated in the argument portion of the brief, whenever necessary, with reference to the Plaintiff's appendix.

ARGUMENT.

I. THE COURT OF APPEALS DECISION MUST BE AFFIRMED BECAUSE THE TRIAL COURT'S JURY INSTRUCTIONS FAILED TO CONVEY THAT AN ELEMENT OF THE CRIME OF OUIL CAUSING DEATH (MCL 257.625(4), REQUIRED THE PROSECUTOR TO PROVE THAT MR. SCHAEFER'S DECISION TO DRIVE WHILE INTOXICATED, WAS A SUBSTANTIAL CAUSE OF THE VICTIM'S DEATH.

The trial court decided to use non-standard jury instructions. While the court may do so, it is nevertheless required that the instructions included each of the essential elements of the crime charged. The trial court failed to do give proper and complete instructions. Even when the jury asked for clarification, it failed to give the complete instruction.

In People v. Lardie 452 Mich 231, at 259-260 (1996), this Court held that, the elements of the crime of OUIL causing death (MCL 257.625(4) were as follows:

"the elements of the crime that the people would be required to prove are similar to those for involuntary manslaughter except that the people would not have to prove gross negligence. Hence, the people must prove that (1) the defendant was operating his motor vehicle while he was intoxicated, (2) that he voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated, and (3) that the defendant's intoxicated driving was a substantial cause of the victim's death."

CJI 2d 15.11 (5) requires that the judge instruct the jury that "the defendant's intoxicated (or impaired) driving was a substantial cause of the victim's death."

This instruction is in keeping with this Court's decision in People v. Lardie 452 Mich 231 (1996), at 267 where this Court said:

"each party may raise a question at trial about whether the people have met their burden of proving that the particular driver's *decision to drive while intoxicated* was a substantial cause of the deaths. The question of causation is a factual one for the jury."

The trial court's failure to provide the above instruction is reversible error, as it resulted in a mis-carriage of justice. People v. Lukity, 460 Mich 484 , 495 (1999).

Trial Court's instruction to the jury was as follows:

The trial court instructed the jury on OUIL causing death as follows:

"The Statute states that:

A person who operates a motor vehicle within the state, while under the influence of intoxicating liquor, or with a blood alcohol content of 0.10."

And it has been agreed by both parties that the evidence in this case is 0.16.

So, the Statute says:

"Any person who shall operate a motor vehicle with an alcohol content of 0.10, by weight of alcohol, and by operation of that motor vehicle causes the death of another person is guilty of a felony."

So, the elements are either operating under the influence, that's one. Or, operating a motor vehicle while the blood alcohol content is 0.10.

And it is agreed by both parties that if the witness were here, the testimony would be that it was 0.16.

And while operating with that alcohol level content causes the death of another person, shall be guilty of a felony. Those are the elements of Operating a Motor Vehicle, under the first count.

It's either driving under the influence, or driving with a blood alcohol content of 0.10. And as a result of so operating a motor vehicle, causes the death of another person.

Those are the elements of Count 1. You may bring back a verdict of guilty or not guilty.

The evidence, as I said, was stipulated to. You have a right to accept that, or you have a right to reject it. It's entirely up to you.

Later, during deliberations, the jury asked for additional instructions:

JURY QUESTION:

THE COURT: Okay. You're asking to explain under the influence, as is stated in Count 1. is [sic] that what you want to know?

JUROR NO. 11: **Also causing death.**

THE COURT: I'm sorry; also what?

JUROR NO. 11: Under the influence causing death.

THE COURT: Yeah, okay.

All I can do is tell you what the Statute says. If that was the case, you have decide that.

But the Statute says:

"Did operate a motor vehicle", at I-75 and Dix in the City of Lincoln Park, "while being under the influence of intoxicating liquor."

"Or', either one, "while being under the influence, or while having an alcohol content of 0.10 grams or more per 100 milliliters of blood.

And by the operation of that vehicle, caused the death of Ronald Rafalski.

So, there are two different ways you can do it. Either under the influence of liquor, regardless of the blood,

being under the influence of liquor. Or, having a blood— driving while the blood alcohol level was at least .10, causing the death of another person.

You have to decide whether or not this happened. **But that's all that the Statute says. Either driving under the influence, or driving with a blood alcohol level of .10.** Okay?

So you have to decide whether or not that happened. All I can do is tell you what the law says. Okay. [Emphasis added.]

(See page 33A-34A and 50A - 51A of Plaintiff's appellant's appendix, for transcript reference).

Standard of review:

"Questions of law, including questions of the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). The Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel,* 207 Mich App 47, 53; 523 NW2d 830 (1994). Although a trial court need not confine itself to standard jury instructions, *People v Petrella,* 424 Mich 221, 277; 380 NW2d 11 (1985),instructions actually given must include all elements of the crime charged, *People v Canales,* 243 Mich

App 571, 574; 624 NW2d 439 (2000). No error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997).

As the trial court failed to give the required instruction pursuant to People v. Lardie 452 Mich 231 (1996) viz. that the prosecutor has to prove that the defendant's drunken driving was a substantial cause of the victim's death, the Court of appeals correctly reversed and remanded for a new trial.

This Court must affirm the decision of the court of appeals, reversing and remanding for a new trial, wherein defendant may raise a question at trial about whether the people have met their burden of proving that the defendant's *decision to drive while intoxicated* was a substantial cause of the victim's death.

A. IS THE "SUBSTANTIAL" CAUSE LANGUAGE IN PEOPLE V. LARDIE, CONSISTENT WITH THE STATUTE MCL 257.625(4)?

The substantial clause language in Lardie, at 259 - 260, states, that in order to sustain a conviction under MCL 257.625 (4) the prosecutor must also prove that,

"defendant's *intoxicated* driving was a substantial cause of the victim's death."

MCL 257.625(4) in pertinent part provides,

"(4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows:

(a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both."

MCL 257.625(1) provides,

"(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means either of the following applies:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

(b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine."

In People v. Lardie (supra) at 259 - 260 this Court held: "the elements of the crime that the people would be required to prove are similar to those for involuntary manslaughter except that the people would not have to prove gross negligence. Hence, the people must prove that (1) the defendant was operating his motor vehicle while he was intoxicated, (2) that he voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated, and (3) that the defendant's intoxicated driving was a substantial cause of the victim's death." (Footnotes omitted).

A bare reading of the statute requires only that the prosecutor prove elements 1 and 2 above. A bare reading of the statute does not require that the defendant's

intoxicated driving be a substantial cause of the victim's death.

In Lardie (supra) at 239, this court held:

"In order to determine whether a statute imposes strict liability or requires proof of a mens rea, that is, a guilty mind, this Court first examines the statute itself and seeks to determine the Legislature's intent. *People v Quinn*, **440 Mich 178**, 185; 487 NW2d 194 (1992). In interpreting a statute in which the Legislature has not expressly included language indicating that fault is a necessary element of a crime, this Court must focus on whether the Legislature nevertheless intended to require some fault as a predicate to finding guilt. *Id.* In this statute, the Legislature did not expressly state that a defendant must have a criminal intent to commit this crime."

In Lardie (supra) at 257-258, after having determined the legislature's intent this Court stated:

"the statute must have been designed to punish drivers when their *drunken* driving caused another's death. Otherwise, the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted. Such an interpretation of the statute would produce an absurd result by divorcing

the defendant's fault from the resulting injury. We seek to avoid such an interpretation. See *Jennings v Southwood*, **446 Mich 125**, 141-142; 521 NW2d 230 (1994).

Moreover, this interpretation would not directly further the Legislature's purpose of reducing fatalities because there is no reason to penalize an intoxicated driver with a fifteen-year felony when there is an accident resulting in a fatality if that driver, even if not intoxicated, would still have been the cause in fact of the victim's death. There would be no reason because it would not prevent that fatality from occurring again. Therefore, in proving causation, the people must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim. In this way, the statute does not impose a severe penalty when the injury was unavoidable for that particular driver (regardless of whether he was intoxicated), because the statute ensures that the wrongful decision caused the death in the accident."

Thus, while the "substantial clause" language in Lardie is not consistent upon a bare reading of the statute; it is consistent after determining legislative intent, and necessary to avoid absurd results.

B. DOES MCL 257.625(4) REQUIRE THE PROSECUTOR TO ESTABLISH THAT THE DEFENDANT'S OPERATION OF THE MOTOR VEHICLE WAS AFFECTED BY HIS INTOXICATED STATE?

A bare reading of the statute, (See also Justice Weaver's dissent in Lardie at 271-273,) does not require the prosecutor to establish that the defendant's operation of the motor vehicle was affected by his intoxicated state. i.e. A bare reading of the statute provides that if a victim dies at the hands of an intoxicated driver, then it does not matter that the driver was not at fault and was driving with greater care than an unintoxicated driver. Thus a bare reading of the statute does not require a nexus between the drunken driving, and the cause of the accident.

Hence this Court stated in Lardie at 257-258,

"the statute must have been designed to punish drivers when their *drunken* driving caused another's death. Otherwise, the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted. Such an interpretation of the statute would produce an absurd result by divorcing the defendant's fault from the resulting injury. We seek to

avoid such an interpretation. See *Jennings v Southwood*, **446 Mich 125**, 141-142; 521 NW2d 230 (1994).

Moreover, this interpretation would not directly further the Legislature's purpose of reducing fatalities because there is no reason to penalize an intoxicated driver with a fifteen-year felony when there is an accident resulting in a fatality if that driver, even if not intoxicated, would still have been the cause in fact of the victim's death. There would be no reason because it would not prevent that fatality from occurring again. Therefore, in proving causation, the people must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim. In this way, the statute does not impose a severe penalty when the injury was unavoidable for that particular driver (regardless of whether he was intoxicated), because the statute ensures that the wrongful decision caused the death in the accident.

C. DOES THE STATUTE OBLIGATE THE PROSECUTOR TO SHOW THAT THE DEFENDANT'S DRIVING AT THE TIME OF THE ACCIDENT WAS A PROXIMATE CAUSE OF ANOTHER PERSON'S DEATH?

MCL 257.625(4) in pertinent part provides, "A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and **by the operation of that motor vehicle** causes the death of another person is guilty…." (Emphasis added)

The statute requires that death of another has to be caused by the operation of a motor vehicle.

Defendant appellant agrees with Plaintiff-appellee's argument in page 18 of their brief, which states:

"Again, the measure of proximate or legal cause is reasonable forseeability of the injury which occurred from the conduct of the accused. Certainly this excludes from criminal liability conduct which is a cause in fact, yet remote. For example, if an individual drives recklessly, so as to endanger pedestrians, and his manner of driving catches the attention of a window washer, who is so intrigued that he fails to pay heed to what he is doing, loses his balance, and falls, then the defendant's driving though a but-for cause of the fall of the window washer, is not the proximate or legal cause of his injuries." (internal footnotes omitted).

The proximate cause of the window washer's death was his failure to pay heed to what he was doing, and not the operation of the motor vehicle.

To this extent as stated above the parties are in agreement that the statute does obligate the prosecutor to show that the defendant's driving at the time of the accident was a proximate cause of another person's death.

D. IS IT SUFFICIENT THAT THE PROSECUTOR BE REQUIRED TO ONLY ESTABLISH THAT:

i. DEFENDANT DECIDED TO DRIVE WHILE INTOXICATED, AND

ii. THAT A DEATH RESULTED?

Even a bare reading of the statute requires causation, i.e. the operation of the vehicle by an intoxicated defendant caused death.

In Lardie at 236, this Court stated, "the Court of Appeals characterized the statute as a "strict liability, public welfare offense"…."

In Lardie at 256, this court however held that the statute does not impose strict liability. This Court stated:

"Rather, we conclude that the statute requires the people to prove that a defendant, who kills someone by driving while intoxicated, acted knowingly in consuming an intoxicating liquor or a controlled substance, and acted voluntarily in deciding to drive after such consumption."

Thus the prosecutor, would be required to also prove that there was a proximate cause between the intoxicated operation of the vehicle and the resulting death.

E. DOES THE STATUTE MCL 257.625(4) VIOLATE THE EQUAL PROTECTION CLAUSE OF THE MICHIGAN CONSTITUTION, [CONST 1963, ART 1 SEC 2], AND THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION [AM. XIV]?

In Lardie (supra) at 234 this court concluded that the statute MCL 257.625(4) was constitutional, and did not violate defendant's due process rights.

However, "Are the equal protection clauses violated when the statute singles out intoxicated (though not at fault for the accident) drivers to suffer the penalties of conviction when given the same facts a non-intoxicated driver would suffer no penalty?"

The answer has to be a resounding "Yes", i.e. the statute violates the equal protection clauses and hence is unconstitutional.

The plain reading of the statute would therefore create absurd results. For example, if a driver of vehicle disregarded a red traffic light and collided with an intoxicated driver who had the right of the way, and the driver (who disregarded the red traffic light) died as a result of the collusion; it is the intoxicated driver who would be guilty of OUIL causing death, simply because he was intoxicated.

Thus a bare reading of the statute would result in the conviction of Mr. James Richard Large in the companion case, Supreme Court docket number 127142) because the child's death resulted due to the defendant operating a vehicle while intoxicated.

The statute does not take into consideration that Mr. Large was not at fault, and that if Mr. Large had not been under the influence of alcohol, no prosecution was even possible.

The question then before the court is that, "is a statute which completely does away with the driver's fault, and which focuses only on the fact that the driver is intoxicated, constitutional?"

The statute prohibiting driving under the influence of alcohol causing death (hereinafter OUIL Causing Death), MCL 257.625(4), is unconstitutional when applied to cases such as this one. The statute requires only that the defendant commit the violation of driving under the influence of alcohol, and at the same time caused the death of another by operating a vehicle.

This court stated in Lardie that the statute does require mens rea (see Lardie at 256).

If the statute requires mens rea, then it requires the intoxicated driver to be at fault, i.e. if the death occurred as a result of an unavoidable accident due to no fault of the driver, then the fact that he was intoxicated should not result in a conviction under MCL 257.625(4).

It is deeply ingrained principle of American law, embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments, that severe criminal punishment may not be imposed on a defendant who does not have a culpable mental state. As the United States Supreme Court explained in Morrisette v United States, 342 US 246 (1952), "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient

notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. "See also United States v United States Gypsum Co., 438 US 422 , 436 (1978) ("pre-existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence"). The Michigan Supreme Court has explained that "[t}he United States Supreme Court has recognized that there are due process limitations on the state's police power to impose a penalty for a violation of a law when a person charged with the crime did not have a criminal intent." People v Lardie, 452 Mich 231 , 260 (1996).

In Lardie at 257-258, this court interpreted the statute to require the intoxicated driving to have a bearing on the death that resulted. This court stated:

"In seeking to reduce fatalities by deterring drunken driving, the statute must have been designed to punish drivers when their *drunken* driving caused another's death. Otherwise, the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted. Such an interpretation of the statute would produce an absurd

result by divorcing the defendant's fault from the resulting injury. We seek to avoid such an interpretation. See *Jennings v Southwood*, **446 Mich 125**, 141-142; 521 NW2d 230 (1994)." (footnotes ommited).

"Moreover, this interpretation would not directly further the Legislature's purpose of reducing fatalities because there is no reason to penalize an intoxicated driver with a fifteen-year felony when there is an accident resulting in a fatality if that driver, even if not intoxicated, would still have been the cause in fact of the victim's death. There would be no reason because it would not prevent that fatality from occurring again. Therefore, in proving causation, the people must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim. In this way, the statute does not impose a severe penalty when the injury was unavoidable for that particular driver (regardless of whether he was intoxicated), because the statute ensures that the wrongful decision caused the death in the accident."

Unless the statute is interpreted as this court did in Lardie (above), the statute punishes only drunken drivers

who cause death (where the death has no bearing on the driving). A sober driver who causes death, (where the death has no bearing on the driving) would not be punished, and as such the statute violates the Equal protection clauses stated in Const 1963 art 1 sec. 2, and U.S. Constitution Am. XIV.

CONCLUSION:

If MCL 257.625(4) is interpreted to read that it is sufficient that the prosecutor establish only that the defendant decided to drive while intoxicated and that a death resulted, then the statute would violate the equal protection clauses of the Michigan and federal constitution as detailed above.

A bare reading of the statute could result in coming to the same conclusion, as the out of Appeal did in Lardie viz. that the statute was a "strict liability, public welfare offense". (Lardie at 236)

A bare reading of the statute would create a class of persons, who would be convicted of a 15 year felony, even when the death had no bearing on their intoxication.

US Const, Am XIV, provides, in pertinent part: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

In People v Sleet, 193 Mich App 604 (1992), this Court summarized current equal protection analysis for statutes:

If the challenged classification affects a fundamental interest or involves a suspect classification, a compelling state interest is required to uphold it. Doe v Director of Dep't of Social Services, 187 Mich App 493 , 522-523; 468 NW2d 862 (1991); People v Perkins, 107 Mich App 440 , 443; 309 NW2d 634 (1981).

Because MCL 257.625(4) regulates a liberty interest, the "compelling state interest" test should apply. The State has no compelling interest in arbitrarily picking out an intoxicated driver and punishing him with a conviction, when it would under the exact same facts not penalize the sober driver when he is not at fault while operating a vehicle causing death.

For the aforementioned reasons, this Court should uphold its ruling in People v. Lardie supra, i.e. that an element of this crime is that the defendant's drunken diving is a substantial cause of the victim' death. Or, in the alternative strike down the statute as it violates the Equal protection clause of the Michigan and Federal Constitutions.

II. DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE COURT INDICATED TO THE JURY, WHILE DEFINING THE ELEMENTS OF THE OFFENSE, THAT THE PARTIES STIPULATED TO THE DEFENDANT'S BLOOD ALCOHOL LEVEL AS BEING 0.16; AS THIS INSTRUCTION ESSENTIALLY DIRECTED A VERDICT ON AN ELEMENT OF THE CHARGED OFFENSE.

The trial court began its jury instructions on the offense of OUIL causing death, using the language of the statute rather than CJI2d 15.11. The instruction included the statement that the prosecutor was required to prove that the Defendant was operating a motor vehicle while under the influence. The court explained the term "under the influence", again using the language of the statute rather than CJI2d 15.11. The court then indicated that the People had to prove that the defendant was "…either operating while under the influence, that's one. Or operating a motor vehicle while the blood alcohol content is 0.10."(see page 33A of Plaintiff appellant's Appendix for transcript reference). At that point, the judge reminded the jurors that the parties stipulated that the Defendant's blood alcohol level was 0.16. The reminder of the stipulation is used three times in this instruction, which was supposed to be the elements of the crime.

Because trial counsel objected to this instruction (page 42A - 43 A of Plaintiff's Appendix) it is preserved for appellate review. Both the United State Supreme Court and the Michigan State Supreme Court have ruled that where a trial court instructs a jury that an element or elements of the charged offense are not in dispute or have been committed, the conviction must be reserved. *United States v Gaudin,* 515 US 506, 115 S Ct 2310; 132 L Ed 2d 444 (1995); *People v Reed,* 393 Mich 342 (1975). Since one of the disputes at the Defendant's trial concerned whether he was under the influence, and whether, his alleged intoxicated state affected his driving when the accident occurred, the reading of this stipulation during the instruction on the elements of the crime was devastating to the defense and, in fact, could have been outcome-determinative.

As stated previously, the court's instructions on the charged offense were inconsistent with the standard jury instructions. While the CJI instructions do not have the official sanction of the Michigan Supreme Court; that Court has encouraged trial judges to examine CJI instructions carefully to insure their accuracy and appropriateness in a given case. *People v Petrella,* 424 Mich 221, 277 (1985). Although the instruction on the elements as set forth in

CJI2d 15.11 and CJI2d 15.15 are correct, the judge failed to read even a modified version of those instructions. The inclusion of the stipulation on the blood alcohol level with the elements of the offense can only be construed as essentially directing a verdict on the "under the influence" element of the offense. While reading that part of the instruction might well be harmless in the majority of cases where the defendant does not dispute that he or she was "under the influence", the instruction was not harmless here.

While it is true that the judge also instructed the jury that they did not have to accept the stipulation (page 34A of Plaintiff's appendix), when a court gives both a proper and an improper instruction, the jury is presumed to have followed the improper instruction. *People v Wright,* 408 Mich 1 (1980).

Accordingly, Defendant is entitled to a reversal of his conviction.

RELIEF REQUESTED.

WHEREFORE, Defendant-appellee David William Schaefer, respectfully requests that the Court of appeals must be affirmed, and the case remanded for a new trial.

Respectfully Submitted:

Dated: 04-11-05.

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